

SENATE BILL 1371

By Summerville

AN ACT to amend Tennessee Code Annotated, Title 3;
Title 4, Chapter 29 and Title 38, Chapter 3, relative
to the "Tennessee Balance of Powers Act".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and may be cited as "Tennessee Balance of Powers Act."

SECTION 2. The general assembly declares:

(1) The Tenth Amendment to the United States Constitution guarantees and reserves to the states and the people all powers not delegated to the federal government elsewhere in the Constitution as they were publicly understood at the time that the amendment was ratified on December 15, 1791, subject only to modification by duly ratified subsequent amendments to the United States Constitution. The guarantee of those powers is a matter of compact between the state and people of Tennessee and the United States as of the time that Tennessee was admitted to statehood in 1796;

(2) In accordance with the compact between the state and people of Tennessee and the United States when Tennessee was admitted to statehood, the Tenth Amendment to the United States Constitution reserves to the state and people of Tennessee that other than the enumerated powers expressly delegated to the United States under Article 1, Section 8 of the United States Constitution, Congress and the federal government may not exercise any purported additional control over or commandeered powers reserved to the state of Tennessee or its people;

(3) The United States Constitution, ratified on June 21, 1788, established that the sole and sovereign power to regulate the state business and affairs rested in state legislatures and has always been a compelling state concern and central to state sovereignty. Accordingly, the foregoing public meaning and understanding of Article 1, Section 8, the Establishment Clause of the First Amendment, and the Tenth Amendment of the United States Constitution is a matter of compact between the state and people of Tennessee and the United States when Tennessee was admitted to statehood. Further, the power to regulate commerce among the several states as delegated to the Congress in Article I, Section 8, Clause 3 of the United States Constitution, as understood at the time of the founding, was meant to empower Congress to regulate the buying and selling of products made by others, associated finance and financial instruments, and navigation and other carriage, across state jurisdictional lines. Said power to regulate “commerce” does not include agriculture, manufacturing, mining, major crimes, or land use. Nor does it include activities that merely “substantially affect” commerce;

(4) At the time the United States Constitution was ratified on June 21, 1788, the Commerce Clause was not meant or understood to authorize Congress or the federal judiciary to regulate the state courts in the matter of state substantive law or state judicial procedure. This meaning and understanding of Article 1, Section 8, the Establishment Clause of the First Amendment, and the Tenth Amendment of the United States Constitution, as they pertain to the validity of religious sectarian or foreign law as being controlling or influential precedent have never been modified by any duly ratified amendment to the United States Constitution. Accordingly, the foregoing public meaning and understanding of Article 1, Section 8 and the Tenth Amendment of the United States Constitution is a matter of compact between the state and people of

Tennessee and the United States when Tennessee was admitted to statehood in 1796. Further, Article I, Section 8, Clause 18 of the United States Constitution, the “necessary and proper clause,” is not a blank check that empowers the federal government to do anything it deems necessary or proper. It is instead a limitation of power under the common-law doctrine of “principals and incidents,” which restricts the power of Congress to exercise incidental powers. There are three (3) main conditions required for something to be incidental and therefore “necessary and proper.” The law or power exercised must be:

- (A) Directly supportive of the main, enumerated power;
- (B) It must be “lesser” than the main power; and
- (C) It must not conflict with any power or restraint expressed in the

Constitution;

(5) In accordance with Article I, Section 8, Clause 1 of the United States Constitution ratified on June 21, 1788, the “general welfare clause,” does not empower the federal government with the ability to do anything it deems good. It is instead a general restriction limiting the exercise of the enumerated powers of Congress set forth in Article I, Section 8 of the United States Constitution, requiring that Congress only enact laws which serve all citizens well and equally. When James Madison was asked if this clause was a grant of power, he replied “If not only the means but the objects are unlimited, the parchment [the Constitution] should be thrown into the fire at once.” Thus, this clause is a limitation on the power of the federal government to act in the welfare of all when passing laws in pursuance of the powers delegated to the United States. Likewise, the Commerce Clause was not meant or understood to authorize Congress or the federal judiciary to establish religious sectarian or foreign

statutes or case law as controlling or influential precedent. Accordingly, the foregoing public meaning and understanding of Article 1, Section 8, the Establishment Clause of the First Amendment and the Tenth Amendment of the United States Constitution is a matter of compact between the state and people of Tennessee and the United States when Tennessee was admitted to statehood;

(6) The general assembly acknowledges that the “Commerce Clause”, the “General Welfare Clause”, and the “Necessary and Proper Clause” of the United States Constitution were amended, and made more specific and limiting at the people's insistence through the creation of the Bill of Rights, i.e. the Second Amendment, the Ninth Amendment, and the Tenth Amendment. All amendments within the Bill of Rights were for the purpose of further restricting federal powers, vesting or retaining the ultimate power and control of the states by the people within the states. Therefore, we specifically reject and deny any federal claim of expanded or additional authority which the federal government may from time to time attempt to exert, exercise, or enforce under these clauses. Further, the people of the state of Tennessee are aware that the federal government has amended and altered the spirit and the meaning of the Commerce Clause, all without proper legislative authority through amendment. Therefore, we reject and deny this unauthorized and excessive abuse of power which has primarily acted as a detriment to states’ powers and individual rights;

(7) In accordance with the United States Constitution, Congress and the federal government is denied the power to establish laws within the state which are not delegated as powers enumerated in the United States Constitution, or are repugnant and obtrusive to the Constitution of Tennessee, state law, and the

citizens of the state. The federal government is restrained and confined in authority by the eighteen (18) items that are set forth in Article I, Section 8 of the United States Constitution;

(8) Congress and the federal government are denied the power to bind the states under foreign statutes or case law other than those provisions duly ratified by the Congress as a treaty, so long as the treaty does not violate the state or United States Constitution;

(9) Further, no authority has ever been given to the legislative branch, the executive branch, or the judicial branch, of the federal government, to preempt state legislation except where the powers delegated to the federal government by their nature require exclusive jurisdiction;

(10) This act shall serve as a notice and demand to the federal government to cease and desist any and all activities outside the scope of their constitutionally-designated powers;

(11) Under the Tenth Amendment, the people and the state of Tennessee retain their exclusive power to regulate the actions of the people and state of Tennessee within its borders, subject only to the Fourteenth Amendment's guarantee, that the people and state of Tennessee shall exercise such sovereign power in accordance with each citizen's lawful privileges or immunities, and in compliance with the requirements of due process and equal protection of the law;

(12) The Ninth Amendment to the United States Constitution secures and reserves to the people of Tennessee, as against the federal government, their natural rights to life, liberty, and property as entailed by the traditional Anglo-American conception of ordered liberty and as secured by state law, including,

but not limited to, their rights as they were understood and secured by the law at the time that the amendment was ratified on December 15, 1791, as well as their rights as they were understood and secured by the law in the state of Tennessee at the time the Constitution of Tennessee was adopted, the people and state hereby proclaim that the guarantee of those rights is a matter of compact between the state and the people of Tennessee and the United States as of the time that Tennessee was admitted to statehood;

(13) The founding fathers specified in the Federalist Papers that "If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify;"

(14) All citizens holding high office in the government of Tennessee have sworn a sacred oath to support and defend the Constitution of Tennessee, and, this oath of support is, of necessity, inclusive of Article I, § 2. Doctrine of non-resistance: "That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind," it is the sworn duty of all state of Tennessee government office holders to resist through all lawful means the imposition of "arbitrary power and oppression," including that promulgated through un-Constitutional legislative actions, regulatory declarations, and executive orders of the Federal Government; and

(15) The United States Constitution, Section 2, specifies, in part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be

made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states...”

SECTION 3. Tennessee Code Annotated, Title 3, Chapter 1, Part 1, is amended by adding the following new sections thereto:

3-1-123.

(a) There is established a commission of recommendation with membership as described in subsections (c) and (d). This commission shall be charged to review such federal laws, regulations, or executive orders, as may come before it through procedures the commission shall create, or as identified in this section, for substantive conflicts with the United States Constitution or the Constitution of Tennessee.

(b) Upon determining the existence of a potentially significant conflict between reviewed federal actions and the United States Constitution or the Constitution of Tennessee, the commission shall recommend and propose for a vote by the general assembly to take actions specified in this subsection (b), subsection (i), or subsection (j). If by a constitutional majority in both chambers, the general assembly votes to adopt a commission recommendation, the general assembly shall direct such properly qualified, legal counsel as it may choose to engage or designate for this purpose to immediately file suit in the United States Supreme Court and to vigorously and expeditiously litigate without delay to challenge the validity of a specific federal law or regulation or executive order which the general assembly has deemed to be outside the scope of the powers delegated by the people to the federal government in the United States

Constitution, or at odds with the Constitution of Tennessee. First priority for choice of this representation shall be given to the best and most competent, no-cost offers of representation, including pro-bono assistance from qualified, competent citizens, attorneys, or domestic public service and non-profit organizations as the general assembly may choose within the bounds of this state's ethics laws. Should the general assembly choose, within the bounds of budgetary constraints, it may designate the attorney general and reporter as the lead counsel in lieu of no-cost offers of representation and/or with such assistance from additional no-cost offers of representation, including pro-bono assistance from qualified, competent citizens, attorneys, or domestic public service and non-profit organizations as the general assembly may choose within the bounds of this state's ethics laws.

(c) This commission shall consist of ten (10) members. Five (5) members shall be from the general assembly: two (2) members from the senate to be appointed by the speaker of the senate and two (2) members from the house of representatives to be appointed by the speaker of the house of representatives, with one (1) additional member alternating, in successive sessions, from each chamber and appointed by the speaker of the appropriate chamber in alternate sessions. Two (2) members shall be appointed by majority vote of the members of the state supreme court. Two (2) members shall be appointed by the governor. The secretary of state shall serve as chair of the commission voting only to break ties.

(d) The members of the commission shall be appointed for terms concurrent with the general assembly from which commission members of the general assembly are, or should be, appointed. In the event a vacancy occurs

after appointment of a commission member, the senior appointing official of the original source organization shall appoint a substitute member to fill the vacancy for the unexpired term. Should the vacancy exist by reason of the secretary of state's inability to serve, the comptroller of the treasury shall be next in succession followed by the treasurer. Should a vacancy exist by reason of an appointment source official's intentional refusal to make the appointments in a timely manner and the commission lacks a quorum to conduct business, the speaker of the house of representatives shall have the power to appoint enough commission members to complete a quorum with those so appointed to complete the remainder of the specified term. Should the failure to appoint enough commission members be the result of inaction by the speaker of the house of representatives, the responsibility to appoint enough commission members to reach a quorum shall devolve to the speaker of senate, then the chief justice of the supreme court, and finally the governor.

(e) The commission shall be supported by the staff of the general assembly's office of legal services and may accept such legal advice, assistance, and input, contingent upon pro-bono or no-cost offers, from any citizens, attorneys, or domestic public service or non-profit organizations as the commission may choose within the bounds of this state's ethics laws. Commission members shall not be compensated for service on the commission beyond expenses.

(f) The commission shall meet as necessary on days when the general assembly is convened for normal business except as the governor may call or the speakers of both chambers may mutually agree. The commission shall accept, prioritize, and schedule for consideration such alleged, federal un-

constitutional, legislative actions, regulatory declarations, and executive orders of which it becomes aware through a nomination process it shall define. Among such nomination procedures as the commission may establish, the commission shall include a means by which the citizens of this state may directly nominate federal actions for commission consideration.

(g) Within thirty (30) days of completing consideration of such federal legislative actions, regulatory declarations and executive orders the commission shall prepare its recommendations as legislation. Immediately following the preparation of the legislation, if the general assembly is in session at such time, a house of representatives member of the commission shall introduce the bill in the house and a senate member of the commission shall introduce the bill in the senate. After the bill receives its first and second consideration on the floor of the appropriate house, the bill shall be placed on the next available space on the next available calendar for consideration by the appropriate house of the general assembly. If the general assembly is not in session at the time the commission completes its consideration, the bills shall be introduced at the beginning of the session following the completion of the commission's consideration.

(h) The commission shall have the power to reach back and take up or review any, and all, existing federal statutes, mandates, and executive orders not previously ruled upon by the United States supreme court for the purpose of determining the constitutionality thereof, and such commission may recommend existing federal statutes, mandates, and executive orders put in place prior to the passage of this act.

(i) Upon the commission's recommendation for litigation to challenge the validity of a federal law, regulation, or executive order, the general assembly

shall vote whether to proceed with the recommended litigation. The appropriate entries reflecting the vote shall be documented in legislative journals of the house and senate. In the event the general assembly votes by a constitutional majority to challenge any federal statute, mandate, regulation, or executive order on the grounds of constitutionality, the state shall, concurrent with filing suit, petition the court to stay, suspend and/or hold in abeyance any contested federal action pending final judicial determination of the suit.

(j) In the event that any federal court rules that the state of Tennessee lacks standing to challenge any federal law, regulation, or executive order that has been challenged pursuant to this section, or such court dismisses any such challenge on grounds that do not result in a ruling on the substantive merits of said challenge, then the challenged federal law, regulation, or executive order is declared by the state of Tennessee to be beyond the authority granted to the federal government pursuant to the United States Constitution, shall be specifically rejected by this state, and shall be considered void. Upon official notice that a formerly pending suit under this section has been dismissed without a hearing on substantive merits, the attorney general and reporter, or such properly qualified legal counsel as the general assembly may choose to engage or designate for this purpose, shall immediately issue, and caused to be served, a formal, legal notice to appropriate United States government offices, including, but not limited to, the office of the United States attorney general and the office of the president of the United States, that federal actions previously under challenge are void and inoperative in this state and the actions named elsewhere in this act, or as may be enacted by the general assembly under § 3-1-124, become operative.

3-1-124. It shall be the duty of the general assembly to adopt and enact any and all measures that may become necessary to prevent the wrongful enforcement of any federal laws or regulations duly stayed, suspended, and/or held in abeyance by any federal action within the boundaries and limits of this state.

SECTION 4. Tennessee Code Annotated, Title 38, Chapter 3, is amended by adding the following new sections thereto:

38-3-124.

(a) It shall be an offense for any official, agent, or employee of the United States government to enforce or attempt to enforce any federal law, order, rule, or regulation that has been declared by the general assembly in fulfillment of the requirements of 3-1-123(i) to be beyond the authority granted to the federal government pursuant to the United States Constitution.

(b) A violator of subsection (a) is guilty of a felony and upon conviction the violator shall be punished by a fine not exceeding two thousand dollars (\$2,000).

(c) In addition to the penalty set forth in subsection (b), any person in violation of subsection (a) shall also be prosecuted for kidnapping if an arrest or attempted arrest occurred, for criminal assault if an unreasonable personal search occurred, for trespass if a search or attempted search occurred, for theft if a seizure or attempted seizure occurred, and for any applicable homicide offense if loss of life occurred in connection with the violation of subsection (a). The persons involved shall also be charged with any other applicable criminal offense.

(d) A defendant under indictment for violation of this section is not entitled to the defenses of qualified immunity or "actions performed in good faith"

if the official, agent, or employee of the United States government knew, or should have known, any actions named in this section were performed under the color of laws, regulations, or executive orders previously declared by the general assembly to be unconstitutional.

SECTION 5. The secretary of state is directed to send a copy of this act to the president of the United States, the president of the United States senate, the speaker and clerk of the United States house of representatives, and each member of the state's Congressional delegation, with the request that this act be officially entered into the Congressional Record.

SECTION 6. For the purposes of making appointments to the commission of recommendation, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes this act shall take effect July 1, 2013, the public welfare requiring it.